A-428-834
Investigation
IA/Group III: HK/ALN
Public Document

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Antidumping Investigation of Cold Rolled Carbon Steel Flat Products from Germany; Notice of Final Determination of Sales at Less Than Fair Value (A-428-834)

Summary

We have analyzed the comments and rebuttals of interested parties in the antidumping duty investigation of cold rolled carbon steel flat products from Germany (A-428-834). As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttals by parties:

1. Use of Adverse Facts Available for Home Market Downstream Sales
2. Home Market Discounts
3. Inland Freight, Mill to Company Border – Movement Expense
4. Home Market Indirect Selling Expenses
5. Home Market Credit Expenses
6. Date of Sale
7. Use of Facts Available for Sales by the Budd Company
8. U.S. Sales Clerical Errors
9. U.S. Credit and Inventory Carrying Costs
10. U.S. Indirect Selling Expense
11. Setting Negative Margins to Zero in the Calculation of the Dumping Margin
12. Clerical Corrections in the Home Market and U.S. Sales and Cost Verification Reports
13. Slabs Supplied by a Thyssen Krupp Stahl AG affiliate
14. Unreconciled Cost Difference
15. Mill Edge Credit in the US Market
16. General and Administrative Expense Ratio
17. Financial Expense Ratio

18. G&A Further Manufacturer
19. Depreciation of Machine Tools and Spare Parts

Background

We published the preliminary determination in this investigation in the *Federal Register* on May 9, 2002. *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Cold Rolled Carbon Steel Flat Products from Germany*, 67 FR 31212 (*Preliminary Determination*). We published in the *Federal Register* an amended preliminary determination in this investigation on May 29, 2002. *See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Cold Rolled Carbon Steel Flat Products from Germany*, 67 FR 37385 (*Amended Preliminary Determination*).

The period of investigation (POI) is July 1, 2000, through June 30, 2001. The investigation covers cold rolled carbon steel flat products sales exported by one company: Thyssen Krupp Stahl AG (Thyssen) and its affiliated importers in the United States: Thyssen Krupp Stahl North America (TKSNA) and Thyssen, Inc. (TINC) (collectively Thyssen). We invited parties to comment on our preliminary determination. We received case briefs from Thyssen and petitioners[1] on August 9, 2002. We received rebuttal briefs from the same parties on August 14, 2002.

Scope of Investigation

For purposes of this investigation, the products covered are certain cold-rolled (cold-reduced) flat-rolled carbon-quality steel products. For a full description of the scope of this investigation, as well as a complete discussion of all scope exclusion requests submitted in the context of the on-going cold-rolled steel investigations, please see the "Scope Appendix" attached to the *Notice of Correction to Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Australia*, 67 FR 52934 (August 14, 2002). For a complete discussion of the comments received on the *Preliminary Scope Rulings*, see the memorandum regarding "Issues and Decision Memorandum for the Final Scope Rulings in the Antidumping Du Certain Cold-Rolled Carbon Steel Flat Products from Argentina, Australia, Belgium, Brazil, France, Germany, Netherlands, New Zealand, the People's Republic of China, the Russian Federation, South Africa, Spain, Swed and Venezuela, and in the Countervailing Duty Investigations of Certain Cold-Rolled Carbon Steel Flat Product France, and Korea," dated July 10, 2002, which is on file in the CRU.

Changes since the Preliminary Determination

1. Home Market Downstream Sales - *See* Comment 1 below
2. Home Market Discounts - *See* Comment 2 below
3. U.S. Sales by the Budd Company – *See* Comment 7 below
4. U.S. Clerical Errors – *See* Comment 8 below
5. U.S. Indirect Selling Expenses – *See* Comment 10 below
6. Unreconciled Cost Difference – *See* Comment 14 below

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[1]Petitioners in this case are National Steel Corporation, Bethlehem Steel Corporation, LTV Steel Company, Inc., United States Steel Corporation, and Nucor Corporation (collectively, "petitioners").

7. Mill Edge Credit – *See* Comment 15 below
8. Depreciation of Machine Tools and Spare Parts – *See* Comment 19 below

For business proprietary details of our analysis of the above mentioned changes to our amended preliminary margin calculations, *see* Memorandum to the File regarding Antidumping Duty Investigation on Certain Cold-Rolled Carbon Steel Flat Products from Germany; Final Determination Analysis for Thyssen Krupp Stahl AG (September 23, 2002) (Sales Analysis Memo) and Memorandum to Neal Halper regarding Cost of Production and Constructed Value Calculation Adjustments (September 23, 2002) (Cost Analysis Memo).

Discussion of the Issues

Comment 1: Use of Adverse Facts Available for Home Market Downstream Sales

Petitioners argue that the Department should apply adverse facts available to Thyssen's downstream sales through affiliated service centers in the German market. Petitioners point out that the downstream sales database provided by Thyssen on May 13, 2002, contains a minuscule percentage of the total downstream sales made by its affiliated resellers during the POI, as reported in Thyssen's supplemental section B response. Petitioners argue that because Thyssen selected downstream sales in the home market to report based only on whether the products it sold to affiliated resellers were identical (*i.e.*, have the same control number) to the products sold in the United States, it excluded similar products that after slitting to narrower widths were identical to U.S. sales in terms of the Department's physical characteristics.

Petitioners argue that Thyssen's failure to report all potential downstream matches significantly distorts the Department's model match and margin calculations. According to petitioners, this is because above-cost resale prices should be included in the Department's calculation of product-specific weighted-average normal values (NV). Petitioners point out that because Thyssen did not provide complete downstream sales data, the volume of sales excluded from a given NV calculation is unknown, and the full extent of NV distortion caused by missing downstream sales cannot be determined.

Petitioners further point out that if the Department were to make a slight adjustment to Thyssen's reported costs or home market adjustments for the final determination, some of the products sold in the home market that were matched to U.S. sales for the preliminary determination would no longer be above-cost sales. In accordance with the Department's methodology, if the identical or most similar home market product fails the cost test, the Department must match U.S. merchandise to the next most similar home market product that was sold above cost. Petitioners argue that to ensure the proper implementation of this methodology, the Department must have databases that contain not only the identical or most similar match, but all other similar matches as well. Otherwise, petitioners conclude, the Department is unable to compare U.S. merchandise to the best home market match, and is unable to calculate accurate margins. Petitioners urge the Department to apply adverse facts available as in the preliminary determination, and to use as a surrogate for downstream sales the highest calculated home market gross price and lowest calculated home market sales adjustments.

Petitioners also argue that the submitted downstream sales data contain other deficiencies

that render them unusable for the Department's calculations. These deficiencies include omissions of invoices, the inclusion in the database of an unknown number of sales to third countries, and numerous discrepancies with respect to payment, shipment and invoice dates, credit expenses, physical characteristics, early payment discounts, commissions, third-country sales, other discounts, and freight to the customer.

Petitioners further argue that Thyssen Stahl Service Center (TSSC) was unable to provide documentation regarding its sales to affiliated parties during verification, casting doubt on the accuracy of TSSC's reported customer relationship codes. Petitioners conclude that this failure casts further doubt on the usefulness and accuracy of Thyssen's downstream sales dataset. Petitioners point to the Department's verification findings that TSSC reported discounts on downstream sales for which no discounts were granted. Second, petitioners point out that the freight charges reported for TSSC's downstream sales are plant-specific averages based on all freight charges incurred in transporting merchandise from Thyssen's plant to all customers, regardless of distance. Petitioners argue that it is wrong to take no account of the distance shipped in reporting freight charges. Finally, petitioners argue that Thyssen's methodology for reporting commissions is fundamentally flawed. First, petitioners cite the verification report as indicating that commissions reported for some downstream sales were based on a six-month period instead of a full year. Second, they point out that the commission was reported as an average paid to all commissioned selling agents, rather than the actual amounts paid to the individual agents who made the sales. Petitioners argue that there is no evidence on the record that every commissionaire used by TSSC received the same percentage commission. Petitioners conclude that Thyssen has continued to hinder the Department's conduct of this investigation and continued not to act to the best of its ability by failing to provide the Department with complete and accurate home market sales information. Accordingly, petitioners urge the Department to continue to employ adverse facts available, as it did in the *Preliminary Determination*.

Thyssen argues that the Department should reverse its decision to rely upon adverse facts available in the calculation of NV for the *Preliminary Determination*. Thyssen cites Department policy regarding the waiver of reporting downstream sales when it would be unduly burdensome, as enunciated in *Gray Portland Cement and Clinker from Japan: Final Results of Administrative Review*, 61 FR 67308, 67313-314 (December 20, 1996) (*Cement from Japan*). Thyssen claims that reporting downstream sales would be unreasonably burdensome, that excluding these sales would not have a distortive effect on the margin calculation, that these sales are at a more advanced level of trade, that the discrepancies found at verification are not material to the Department's determination, and that all the reasons for which the Department relied on facts available in the *Preliminary Determination* have been adequately addressed. Thyssen also claims that the use of adverse facts available in the Final Determination would be contrary to the Department's mandate and the statutory prohibition against relying on an adverse inference when a respondent satisfies the requirements in Section 782(e) of the Tariff Act of 1930, as amended (the Tariff Act), citing *Nippon Steel Corp. v. United States*, 146 F. Supp. 2d 835 (Court of International Trade (CIT) 2001) (*Nippon Steel).*

Thyssen asserts that the Department has a consistent practice of excusing respondents from reporting downstream sales when the Department confirms that reporting those resales

would be unreasonably burdensome, and only resorts to adverse facts available when the respondent's claim as to burden does not withstand verification. To support its assertion, Thyssen cites to *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Administrative Review*, 65 FR 6935, 8946-8948 (February 23, 2000) *(Corrosion-Resistant CSFP from Japan), Certain Cut-to-Length Carbon-Quality Steel Plate Products from Japan*: *Final Determination of Sales at Less Than Fair Value*, 64 FR 73215, 73224-73225 (December 29, 1999) (*CTL Plate from Japan), Stainless Steel Bar from Germany*: *Final Determination of Sales at Less Than Fair Value*, 67 FR 3159 (January 23, 2002) (*SS Bar*), and *Structural Steel Beams from Germany*: *Final Determination of Sales at Less Than Fair Value*, 67 FR 35497 (May 20, 2002) (*Steel Beams from Germany).*

Thyssen notes that at the sales verification, the Department confirmed that TSSC does not maintain a link between the mother coil and the downstream sale, that TSSC had to search manually for the information necessary to complete the data requested, and that virtually all cold rolled steel sold by TSSC was slit prior to resale from coils supplied by multiple vendors. Thyssen argues that the link between the mother coil and the downstream sale could not be established in the context of an AD investigation, and notes that Thyssen provided TSSC with a list of sales from which to construct the link. Thyssen supplied the list of sales from the control numbers that match identically to Thyssen's U.S. sales, from which TSSC constructed the database submitted to the Department on May 13, 2002. Thyssen notes that TSSC constructed the database through the use of personnel from accounting, sales, and purchasing in each of TSSC's five plants in a manual process (amounting to 36.5 work days) in which they attempted to link the sales for a percentage of Thyssen's sales to TSSC during the POI. Thyssen asserts that because it would have required at least six to nine months to complete the database for all TSSC sales, Thyssen did not have the ability to provide the downstream sales information within the time constraints of an investigation and therefore should not be subject to adverse facts available.

Thyssen argues that it has established that downstream sales would not be used to calculate dumping margins, as these sales would most likely not be needed in the calculation of NV and as there are sufficient remaining home market sales to match to U.S. sales, citing *Certain Cut-to-Length Carbon Steel Plate from Finland: Preliminary Results of Administrative Review,* 62 FR 37866 (July 15, 1997), *Certain Cut-to-Length Carbon Steel Plate from Germany: Preliminary Results of Administrative Review*, 61 FR 51907 (October 4, 1996), *Certain Cut-to-Length Carbon Steel Plate from Brazil: Final Results of Administrative Review*, 62 FR 18486 (April 15, 1997), *Certain Cold-Rolled Carbon Steel Flat Products from Germany: Preliminary Results of Administrative Review*, 60 FR 39355 (August 2, 1995), and *Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Administrative Review* 60 FR 36105 (July 13, 1995). In addition, Thyssen notes that in *Cement from Japan*, rather than resorting to facts available for unreported downstream sales, the Department dropped those sales from its analysis. Thyssen argues that the sales listing submitted on March 19, 2002, confirms that virtually all subject merchandise sold by Thyssen's affiliated service centers had been further processed into non-subject merchandise prior to resale, and as such would not be used for comparison purposes. Thyssen noted that a small percentage of TSSC sales could be used for comparison purposes, as they would not match identically to the widths sold in the United States. In addition, Thyssen claims that the May 13, 2002, database submitted to the Department conclusively establishes that

downstream sales would not be used to calculate margins. Thyssen provided a list of the products that were sold in the United States and noted that a *de minimis* quantity of downstream sales would match identically to these U.S. products, compared to Thyssen's above-cost sales to unaffiliated customers. Thyssen argues that excusing affiliated service centers from reporting downstream sales would have no impact on the margin, because only a small percentage of steel it sold to TSSC which could have been used for comparison purposes was still identical to U.S. sales after processing by TSSC and sale to unaffiliated customers.

Thyssen argues that sales by Thyssen's affiliated service centers fall into a distinct level of trade (LOT), and therefore should not be used for matching purposes. Thyssen asserts that the Department's rejection of Thyssen's claimed level of trade should be reversed based on the further processing and other services provided by the service centers. Citing *Structural Steel Beams from Spain*: *Final Determination of Sales at Less Than Fair Value*, 67 FR 35482 (May 20, 2002), *Structural Steel Beams from Luxembourg*: *Final Determination of Sales at Less Than Fair Value*, 67 FR 35488 (May 20, 2002), and *Steel Beams from Germany*, Thyssen claims that the treatment of selling functions in the *Preliminary Determination* is contrary to similar operations in recent determinations. Thyssen notes that the service centers provide further processing, sell to more types of customers, sell in smaller quantities, maintain stock in inventory for a longer period of time, incur indirect selling expenses (ISEs) for the sale, and provide many sales services that Thyssen does not. Therefore, Thyssen asserts, the Department should conclude that downstream sales are at a more advanced LOT than sales by Thyssen, and base normal value on Thyssen sales, rather than service center resales.

Thyssen also claims that none of the discrepancies in the TSSC database have an impact on the margin analysis, due to the fact that the Department has verified that the TSSC database was complete and the downstream sales are no longer identical to U.S. sales. Thyssen asserts that the Department's finding that the TSSC database over-reported tonnages, double-counted sales, and included resales to third countries is correct, though Thyssen notes that all resales were intentionally included even if the sales were outside the POI, sold to third countries, or over-reported to account for all potential sales. Thyssen also notes that the quality reported in the SPEC2 field of the TSSC database accurately reflects the physical characteristics of the merchandise; and that the widths reported on certain sales were reported accurately according to the manual search of the specific invoices, which confirms that the merchandise was slit and/or cut into non-identical merchandise. Additionally, Thyssen argues that the discrepancies found by the Department in the discount, commission, and credit fields should have no impact on the calculation of margins, since TSSC resales will not be used for comparison purposes. Citing the court's finding in *Nippon Steel* that a "completely errorless investigation is simply not a reasonable expectation," Thyssen also notes that the differences were insignificant (*e.g.*, to TSSC's disadvantage or *de minimis*), and thus do not call into question the credibility of the TSSC database.

Thyssen additionally argues that the concerns raised by the Department in its *Preliminary Determination* have been addressed. Specifically, Thyssen claims that the Department has confirmed that Thyssen's service centers could not have completed the requested database in less than six to nine months and that the burden of reporting the database that was provided was extraordinary. Citing *Certain Cold-Rolled Carbon Steel Flat Products from Germany: Final Results of Administrative Review*, 60 FR 65264 (December 19, 1995), Memorandum to File

(May 2, 1995), Thyssen also notes that it provided statements from two of its largest service centers, in which they assert that reporting these sales would be burdensome. Thyssen also states that these sales were no longer identical with the steel it sold in the United States, and it had submitted a complete list of sales containing width and form from which the Department could have confirmed that the sales had been cut and/or slit. Thyssen notes that the Department's concern that these sales have potential matches has been addressed in the database submitted on May 13, 2002, and at verification. Additionally, Thyssen notes that it reported comprehensive selling expense information in its May 13, 2002, submission, and as such the Department can no longer cite a failure to report as a reason to resort to facts available.

Petitioners reject Thyssen's claim that reporting downstream sales would be unduly burdensome. They argue that record evidence demonstrates that Thyssen had both the ability and the time necessary to provide the requested information, but did not make a good-faith effort to comply. Petitioners point out that Thyssen was aware of the reporting requirement on November 16, 2001, and that the Department repeatedly found insufficient record evidence to excuse Thyssen from this reporting requirement. Petitioners note that Thyssen failed to discuss an acceptable reporting methodology with the Department, or otherwise ensure submission in a timely manner. Moreover, petitioners point out that Thyssen managed to compile and submit a downstream sales listing on March 19, 2002, only 15 days after the Department's warning that it would use facts available. Petitioners argue that this demonstrates Thyssen's ability to gather and compile the data quickly. In addition, petitioners note that, when faced with punitive measures, Thyssen was able to overcome the alleged overwhelming burden and submit an entirely new section B response for its downstream sales, as well as a downstream sales database in the format required by the Department, only 17 days after the Department provided respondent with another opportunity. Petitioners cite Thyssen's statement in its case brief (at 21) that it submitted the data with the "express purpose of confirming that TSSC's resales of CR {cold-rolled steel} purchased from TKS {Thyssen} during the POI would not be used to calculate dumping margins" as evidence that it was never Thyssen's intent to report usable data, but only to avoid adverse facts available. Therefore, petitioners argue, Thyssen's reliance on *Nippon Steel* is misplaced, because respondent has not made significant or consistent efforts to comply with the Department's requirements. Likewise, petitioners reject the applicability to this investigation of *Steel Beams from Germany*, where the Department verified the resellers' complete lack of any method to identify and report any resales. In contrast, petitioners argue, in this case the Department verified the means by which compilation was possible and accomplished. Furthermore, petitioners argue, the complications Thyssen claims as evidence of overwhelming burden are the result of its own self-imposed time constraints rather than those of the investigation itself. That is, had Thyssen identified the problem with retrieving invoice numbers from its computerized system in November 2001, petitioners argue it could have easily resolved it and avoided the manual invoice trace.

Petitioners argue that Thyssen's assertion that there is no need to report downstream sales because they are at a LOT different and more removed from the LOT of home market sales to end-users is wrong. Petitioners cite the Department's longstanding policy not to consider manufacturing operations as relevant to its LOT determination, arguing that its determination in *Steel Beams from Germany* was aberrational. Petitioners cite *Final Determination of Sales at*

Less than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002) and accompanying *Issues and Decision Memorandum* at comment 6, and *Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 66 FR 3540 (January 16, 2001), in which the Department explicitly held that further manufacturing operations are not selling functions, and are therefore not relevant to a LOT analysis. Petitioners point out that Thyssen failed to name, describe and quantify the exact selling functions performed because it assumed that its resellers' ISEs demonstrate that the resellers are performing substantial selling functions. Petitioners argue that the Department should reject this claim because of Thyssen's lack of specificity and because TSSC's reported ISEs include administrative expenses related to manufacturing operations, as noted in the home market verification report. When these administrative expenses are excluded, petitioners argue, the remaining ISEs are not indicative of substantial selling functions upon resale. Petitioners conclude that the only apparent differences in selling functions between Thyssen's sales to end-users and its downstream sales are those related to inventory and just-in-time delivery services, and quantity. In its *Preliminary Determination*, the Department found these to be minor, and petitioners note that no evidence was discovered at verification to reverse this conclusion. Petitioners therefore urge the Department to determine that downstream sales and sales to end-users take place at the same LOT.

Petitioners urge the Department to reject Thyssen's arguments concerning the discrepancies the Department found at verification in Thyssen's downstream sales database. Petitioners argue that these discrepancies permeate the database and because the Department is unable to identify and correct all errors, any attempt to include the data in the final determination calculations will generate additional margin distortions.

Petitioners further assert that the numerous deficiencies remaining in the downstream sales data reported to the Department continue to require the use of adverse facts available. Petitioners further note that Thyssen's incomplete and inaccurate submission is a result of Thyssen's failure to attempt to report these home market downstream sales early in the investigation, despite requests by the Department. Petitioners argue that this failure to act to the best of its ability authorizes the Department under the Act to draw an adverse inference in the final determination. Petitioners further argue that Thyssen did not comply with the Department's request to report all sales, but instead utilized self-selected and flawed criteria to select a limited number of downstream sales, and failed to report all sales that should have been included in its methodology. Petitioners assert that this demonstrates that Thyssen withheld or failed to provide information.

Petitioners argue that Thyssen's methodology excluded reportable sales by selecting sales based on its date of sale to its affiliates, rather than the date of sale by the affiliates to its downstream customer. Petitioners also assert that the date on which affiliates purchase material from Thyssen is irrelevant in the selection of downstream sales, and that all sales should have been reported regardless of when Thyssen sold the merchandise to its affiliates. Petitioners claim that this demonstrates a failure to provide information, citing section 776(a)(2)(B) of the Act, which supports the application of facts available. Additionally, petitioners point to the average freight amounts (regardless of distance shipped) as an indicator that the record contains numerous examples of Thyssen's failure to provide complete and accurate information to the

Department. Accordingly, petitioners urge the Department to continue to employ adverse facts available for the final determination.

Thyssen argues that petitioners have ignored section 782(e) of the Act, requiring the Department to accept the information submitted if the respondent has demonstrated that it acted to the best of its ability, and the information is submitted by the deadline, can be verified, and is not unreliable, noting that it submitted statements by TSSC and Herzog Coilex GMbH (Herzog), which confirmed the burden of providing such information. Thyssen also asserts that petitioners have ignored longstanding Department policy and the confirmation by the Department at verification that compilation of the data would be unduly burdensome. Thyssen argues that petitioners' failure to consider the burden to Thyssen or the relevance of the March 19, 2002, database in the Department's analysis of home market downstream sales constitutes sufficient reason for the Department to summarily reject petitioners' allegations.

Thyssen claims that petitioners' allegation that certain potentially identical sales were excluded without explanation is incorrect, and that Thyssen advised the Department that these sales were excluded because the burden of reporting these sales outweighed the utility of the data, and that the Department was advised by the processor, Herzog, that these resales would not be used for matching. Thyssen also claims that petitioners' assertion that the provided database is insufficient due to omission of potential similar matches is flawed. Thyssen notes that TSSC's March 19, 2002, submission shows that a *de minimis* number of resales could be used for comparison purposes, and that the downstream sales Thyssen selected to report were, based on the Department's *Preliminary Determination*, the most likely to be selected for comparison purposes. Thyssen further notes that the omission of a second coil from an invoice was intentional, as the width was not identical and the burden of reporting this coil exceeded the utility of the data. Thyssen also rejects petitioners' claim that similar products may have been further processed in the home market into a product identical to U.S. products. Thyssen claims that petitioners' example constitutes the exception, as it is extremely unlikely that an affiliated service center would have processed a wider coil into an identical match when it also purchases a narrower coil from Thyssen. Thyssen also argues that the fact that resold products differ from the purchased product's width is irrelevant, as long as Thyssen sold products at prices above cost to unaffiliated customers in the home market that are identical to the products sold in the United States.

Thyssen rejects petitioners' claim that NVs and margin calculations could be distorted due to higher resale prices for certain products purchased by affiliated resellers than net prices to the resellers. Thyssen claims that a portion of the products analyzed by petitioners are at a lower resale price, and that the most significant products have resale prices that are lower than petitioners claim. Thyssen also notes that the *de minimis* quantity of resales of a particular identical product should be considered when analyzing petitioners' argument. Thyssen further argues that the fact that a relatively small percentage of home market sales of a particular product is above cost is meaningless, as the Department should instead compare the quantity of above-cost sales to unaffiliated customers to the quantity of resales of the identical product, and weigh the probability that there will not be above-cost sales in the final determination. Thyssen claims that for the final determination, any potential increase to its costs based on the

Department's findings at verification will be *de minimis*, and therefore have no material impact on the analysis of downstream sales.

Thyssen further argues that petitioners' claim that the downstream sales database contains discrepancies that make it unusable is incorrect. Thyssen asserts that the Department verified the completeness of the March 19, 2002, sales listing, that the May 13, 2002, database established that TSSC had further processed the merchandise into non-identical products, and that TSSC had accurately reported all resale prices and the most significant adjustments to price, rendering errors in the May 13, 2002, database irrelevant to the Department's margin calculation. Thyssen claims the following:

(1) The invoices omitted from TSSC's sales database could not be used to calculate margins, as the ones that were resold were further processed into non-identical merchandise.

(2) Thyssen included downstream sales of its sales to affiliated resellers made during the POI, as according to 19 CFR 351.403(d) of the Department's regulations, Thyssen alleges it was not required to report resales of merchandise it sold prior to the POI. Thyssen noted that to report all downstream sales by the affiliated resellers would have required a burdensome manual search, that the submission accomplished its purpose to establish that the burden on TSSC would outweigh the impact, and that only a *de minimis* percentage of merchandise sold by TSSC during the POI was identical to merchandise sold to the United States (thus having no impact on the calculation of margins).

(3) Thyssen intentionally included third country resales to confirm that resales would not be used to calculate dumping margins, and these sales were identifiable through the destination (DESTH) field.

(4) The errors in shipment date are trivial (differences of one or three days).

(5) The errors in payment dates were clearly clerical errors, not indicative of systemic errors.

(6) Widths were correctly reported, as discussed in Thyssen's case brief.

(7) Specifications were correctly reported as the actual physical characteristics of the merchandise, and if the specifications were to be based on TSSC's representations to its customers, the merchandise would still not be identical because it has been cut and/or slit prior to resale.

(8) The error on a discount not on the invoice is limited to a single sale, which will not be used for comparison.

(9) Early payment discounts were coded correctly based on Thyssen's methodology to report these discounts when terms of payment indicate they were offered.

(10) Thyssen's reported freight for TSSC is reasonable and consistent with Department policy that, in appropriate circumstances, freight does not have to be reported on a sale-specific basis.

(11) The errors in reporting commissions were *de minimis* and the reported amounts by TSSC were generally less than the amounts paid.

(12) TSSC provided the Department with an analysis of all sales for FY 2000/01, and the Department did not find any discrepancies with respect to the customer relationship codes reported. Therefore, TSSC's inability to provide a summary of sales to affiliates and unrelated parties (which was not maintained by TSSC in the ordinary course of business) has no relevance to the Department's analysis.

Thyssen concludes that the Department should reject petitioners' request to calculate margins for downstream sales based on facts available with adverse inference.

Department's Position: We agree with petitioners that the use of facts available is appropriate for Thyssen's unreported downstream sales. In this regard, we note that section 776(a) of the Tariff Act instructs the Department to use "the facts otherwise available" in reaching its determination if "necessary information is not available on the record" or an interested party "fails to provide such information by the deadlines for submission of the information or in the form or manner requested." When the Department determines that the use of facts available is appropriate pursuant to section 776(a), the statute further provides that the Department may use an inference that is "adverse" to the interested party when selecting from the facts available if the Department determines that the interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." *See* section 776(b). In making this determination, the Department considers "the respondent's overall conduct, the importance of the information, the particular time pressures of the investigation, and any other information that bears on the issue whether the deficiency was an excusable inadvertence or a demonstration of a lack of regard for its responsibilities in the investigation." *See Tung Mung Development Co., Ltd. V. United States*, Slip Op. 2001-83, Court No. 99-07-00457 (CIT 2001).

Prior to the *Preliminary Determination*, Thyssen refused after repeated requests (in the original questionnaire, two subsequent letters, a supplemental questionnaire, meetings with Department personnel) by the Department to report all of its downstream sales by affiliated resellers in the home market. At Thyssen's request, the Department granted numerous extensions of time to complete the reporting of these sales, as the Department wished to give Thyssen adequate time to provide accurate data to the Department.[2] S*ee* Letters to Gail Cumins, dated December 12, 2001, December 21, 2001, March 4, 2002, and March 5, 2002. Despite the Department's repeated efforts to provide Thyssen with sufficient time to report downstream sales (amounting to nearly six months between the initial questionnaire and the *Preliminary Determination*), Thyssen failed to provide the information in the format requested, or in a timely

[2] Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. If the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interest party acted to the best of its ability in providing the information. Where all these conditions are met, and the Department can use the information without undue difficulties, the statute requires it to do so.

manner.[3]

Although Thyssen submitted additional information on its downstream sales on May 13, 2002, the information provided to the Department by Thyssen after the *Preliminary Determination* is not sufficient to prove Thyssen's claim that the unreported downstream sales would not be used for model matching purposes, as it included a highly selective group of sales and did not take into account most similar matches. Additionally, the information supplied to the Department contained significant errors, including third country sales and misreported adjustments.[4] Furthermore, Thyssen did not consult with the Department on an alternate methodology to alleviate the claimed burden and, under Thyssen's reporting methodology, the majority of the sales that were reported to the Department were not assigned control numbers (CONNUMs) needed for matching purposes. In addition, Thyssen selected the sales based on Thyssen's date of sale to its affiliated trading companies/service centers (SSCs), rather than the date of resale by the SSC to the first unaffiliated customer.

The record clearly reflects, and Thyssen does not dispute, that it failed to report all of its home market sales in the format requested by the appropriate deadlines. We determine that Thyssen did not act to the best of its ability and that it is therefore appropriate to apply an adverse inference for the missing home market sales. In reaching this conclusion, we note that Thyssen's failure to report a substantial portion of home market sales is a serious error. Indeed, the information on the record indicates that Thyssen may have failed to report nearly half of its total home market sales. Although Thyssen claims the unreported sales are not relevant because they are not identical to (and therefore will not match to) U.S. sales, Thyssen has not provided sufficient information about the unreported sales to substantiate this claim. In particular, Thyssen did not even provide complete CONNUMs for the few downstream sales it reported. Without this critical CONNUM information, the Department has no way of knowing whether the downstream sales match to U.S. sales as Thyssen claims. Moreover, even if the unreported downstream sales are not identical to any of the U.S. merchandise, these downstream sales could nevertheless match to some U.S. sales as "most similar" non-identical merchandise. Seven CONNUMs for products sold in the United States did not have identical matches in the home market. Under the Department's model matching methodology, those products would normally be matched to the most similar products in the home market. Without the downstream sales information, there was no objective way to determine the pool of most similar matches for margin calculation purposes.

Thyssen has not shown that it should be excused from reporting these sales due to an excessive burden in preparing the information. In *Corrosion-Resistant CSFP from Japan*, the Department excused the respondent from reporting downstream sales because the verified facts supported its claim that it was unable to supply this information. In *CTL Plate from Japan*, the Department found that the affiliated companies were unable to distinguish CTL plate produced by the respondent from that produced by other manufacturers, and even if they could, the affiliates' sales records did not contain the product characteristics information necessary to construct control numbers. In this investigation, in contrast, we verified that TSSC was able to

[3] Indeed, as noted in the *Preliminary Determination*, the information Thyssen submitted to the Department on March 19, 2002, was insufficient for accurate model match or margin calculation purposes. The Department issued an additional supplemental questionnaire on April 26, 2002, after the *Preliminary Determination* was signed.
[4] *See* U.S. Sales Verification Memorandum (U.S. Sales Report), dated July 23, 2002, at 64, 80.

manually trace the link between Thyssen's coil and downstream sales and produce a downstream sales database in the course of nine days. Thyssen's claim of excessive burden is refuted by the fact that its SSCs were able to report a portion of these downstream sales in only nine days once requested to do so. In *Steel Beams from Germany,* the Department verified the veracity of the respondent's claim that it would take as long as two years for some of its resellers to report the necessary data and that for others it would be impossible. The Department found that the respondent and its affiliates acted to the best of their ability in attempting to provide the requested information. That is not the case with regard to Thyssen's efforts.[5]

Rather, the facts in this case demonstrate that Thyssen withheld information repeatedly requested by the Department, made no effort to collect the information until after the Department warned Thyssen it would apply adverse facts available, and unilaterally adopted a flawed methodology of reporting. At verification, the Department found that the requested information on home market downstream sales could have been provided had Thyssen acted upon the Department's request for information at the beginning of this investigation. Moreover, had Thyssen attempted to cooperate on a timely basis, the downstream database it compiled would have contained far fewer errors.

We find that Thyssen has not cooperated to the best of its ability. Consequently, for the final determination it is appropriate to apply adverse facts available. Since the partial downstream information provided by Thyssen is not useable, verifiable, or complete, we are disregarding any such information and resorting to facts available for these sales. As facts available for the missing downstream sales, we have calculated the highest gross unit price (GRSUPRH) reported by CONNUM for all remaining home market sales, and applied that price to all home market sales within that CONNUM, which is a change from the *Preliminary Determination* where we applied the modified price to two widths only. In addition, we have determined to apply the lowest or highest adjustments – whichever is adverse – for the CONNUMs defined above. The highest GRSUPRH and the adverse adjustments were applied to all home market sales and the revised amounts were used to calculate normal value (NV). For a complete description of the methodology used, *see* Final Determination Analysis Memorandum to the File, dated September 23, 2002, at 1-4.

Comment 2: Home Market Discounts

Thyssen argues that the Department should adjust NV to account for trader discounts granted on home market sales to end users through trading company/service centers. Thyssen asserts that the Department confirmed at verification that trader discounts were paid by Thyssen not only on sales to service centers, but also on sales through service centers to end users. Thus, Thyssen claims, the Department should, in the final determination, deduct the trader discount from NV on sales through service centers as a discount or as a commission, pursuant to section 351.410 of the Department's regulations, or as a direct selling expense on all sales where Thyssen reports a trader discount in field OTHDIS3H.

Petitioners argue that Thyssen failed to clarify the nature of discounts appearing on the

[5] Thyssen also cited the *SS Bar* final determination, but we are unable to identify any issues in that case that are relevant to Thyssen's argument about burden.

invoice, or to demonstrate the accuracy of the reported amounts. Petitioners cite the home market sales verification report, which states that Thyssen did not have available records to describe the type of discount or support the reported amount for a sales trace. Petitioners urge the Department to apply facts available and to deduct from all sales with reported discounts no more than the highest verified amount reported in the OTHDIS1H field.

Thyssen claims that petitioners distort the Department's findings at verification when they state that Thyssen failed to provide clarification of the nature of these discounts. Thyssen notes that the Department verified that these discounts were negotiated between the sales department and the customer for various reasons and are booked as part of the invoice cost on Thyssen's invoicing system. Thyssen asserts that the Department confirmed the accuracy of the amounts reported in its sales database as the amounts appearing on the invoice, and notes that the reason these discounts were granted is irrelevant to the analysis of the dumping margin and does not constitute sufficient reason to reject the discount or resort to facts available.

Department's Position: Based on the verified information that Thyssen grants these discounts for such sales, we agree with Thyssen that trader discounts should be deducted from both sales to and sales through trading companies/service centers. We therefore have modified the margin calculation from the *Preliminary Determination* to apply the trader discount to sales to and sales through trading companies/service centers.

We disagree with petitioners that Thyssen has not demonstrated the accuracy of the reported amounts for discounts appearing on the invoice, as we verified payment of invoices through the trading companies/service centers that included these discounts (*see* Home Market Verification Report at 13, 20, 56, 57). It is the Department's practice to deduct discounts appearing on the invoice from gross unit price. In *Notice of Final Results of Antidumping Duty Review: Certain Pasta from Italy*, 65 FR 7349, at Comment 15 (February 14, 2000), the Department held that "discounts recorded on the invoice as deductions to the gross unit invoice price should be deducted…in order to reflect the actual amount invoiced to the customer." Therefore, we have deducted invoiced discounts from gross unit price for the final determination.

Comment 3: Inland Freight, Mill to Company Border (INLFTWH) – Movement Expense

Thyssen argues that in the *Preliminary Determination* the Department should not have rejected Thyssen's adjustment to normal value for INLFTWH as a movement expense and reclassified it as an addition to Thyssen's cost of manufacturing. Citing the Statement of Administrative Action (SAA) at 827, and new section 773(a)(6)(B), which provide for the deduction of movement charges from normal value, Thyssen notes that failure to deduct all movement charges from the foreign price would result in a distorted comparison.[6] Thyssen claims that at verification the Department confirmed that these costs constitute a transportation expense and, therefore, should be deducted from normal value as a movement expense.

[6] Thyssen also cites *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of Administrative Review*, 63 FR 32833 (June 16, 1998), and the Department's Antidumping Manual, Chapter 8, pages 14-16

Petitioners counter that neither the home market cost or sales verification reports confirm that this freight is the first leg of movement to the customer. Petitioners state that both reports indicate that the Department did not verify any documentation, and Thyssen did not provide any documentation that demonstrates that the expense is incurred after the sale, allowing it to be characterized as a movement expense. Rather, petitioners point out, the Department discovered at its home market verification that Thyssen maintains these freight costs on a monthly basis in the ordinary course of business as a cost of production that can be traced back to its cost accounting system. Therefore, petitioners conclude, the Department should continue to treat these freight costs as an addition to Thyssen's reported costs of manufacturing.

Department's Position: We disagree with Thyssen that freight from the mill to the loading dock at the company border should be deducted from NV as a direct selling expense, as section 773(a)(6)(B)(ii) of the Act states that movement expenses are transportation and other expenses, including warehousing expenses, incurred by the seller after the merchandise leaves the point of shipment. The Department found at verification that this adjustment was an internal freight expense by affiliated carriers, which was incurred before the point of shipment using external freight carriers. *See* Home Market Sales Verification Memorandum (Home Market Sales Report), dated July 23, 2002, at pages 69-70. Thyssen has not demonstrated conclusively that this expense is not more properly defined as a cost of production. Therefore, we have not modified our treatment of these freight costs as an addition to Thyssen's cost of manufacturing for the final determination.

Comment 4: Home Market Indirect Selling Expenses

Thyssen argues that, contrary to the Department's statement in its Home Market Sales Verification Report, there are no discrepancies in its calculation of indirect selling expenses (INDIRSH). Thyssen notes that the Department erred in its reading of the number for customer-related research and development, which resulted in an incorrect recalculation of INDIRSH. Thyssen also asserts that though the Department correctly noted that certain expenses that belong with the hot-rolled steel sales department should be excluded from the numerator, these sales should not be included in the denominator, as it would be an unreasonable dilution of the ratio.

Petitioners did not comment on this issue.

Department's Position: We agree with Thyssen that the Department misread the figure for customer-related research and development in Home Market Verification Exhibit 27. Accordingly, we have disregarded this statement in the Home Market Sales Verification Report and we have made no adjustments to INDIRSH for the final determination.

Comment 5: Home Market Credit Expenses

Petitioners urge the Department to recalculate Thyssen's reported home market credit expenses based on the interest rate found at verification, rather than the interest rate reported by Thyssen. Petitioners note that the Department discovered that Thyssen miscalculated its short-term interest rate, and claim that the Department should use the revised short-term rate for the final determination.

Thyssen did not comment on this issue.

Department's Position: We disagree with petitioners that a correction should be made to the calculation of credit for the home market. The error found at verification was an error on the rate of Thyssen's inter-company borrowing due to an incorrect cost charge applied to the its parent company's (Thyssen Krupp AG (TKAG)) borrowing rate, and was not used in the calculation of the credit expense reported to the Department. We verified that Thyssen correctly used the published interest rate in its calculation of credit expense, as the only short-term borrowings Thyssen incurred were from its parent company, TKAG (*see* Home Market Verification Report at 78-79). Therefore, we have made no changes to the calculation of home market credit expenses for the final determination.

Comment 6: Date of Sale

Petitioners argue that the order confirmation or contract date appears to be the date when the material terms of sale are set for the majority of Thyssen's U.S. sales, and that Thyssen failed, both in its responses and at sales verification, to provide evidence that changes in the material terms of sale occurred with enough frequency to warrant the use of invoice date as the date of sale. Petitioners point out that the Department stated in its preliminary determination that if it determines that the order confirmation date, or a date other than invoice date, is the appropriate date of sale, it would resort to facts available for the final determination. Petitioners conclude that the Department should apply as adverse facts available to all U.S. sales the higher of the highest non-aberrational margin calculated for any given U.S. sale or the highest rate indicated in the petition, *i.e.*, 26.03 percent.

Thyssen asserts that petitioners' claim that the invoice date does not constitute the date of sale for U.S. sales should be rejected, as petitioners ignore Department precedent, misconstrue the evidence on record, and fail to acknowledge that verification confirmed Thyssen's position. Citing 19 CFR 351.401(i) of the Department's regulations, Thyssen argues that the Department's date of sale decisions are based on the presumption that date of sale is the invoice date unless the Department is satisfied that a different date reflects the date on which the terms of sale are established. Thyssen further argues that according to the regulations, the respondent is not required to provide evidence of frequent changes in material terms of sale, noting that the regulations provide that the Department will use a single date of sale for each respondent, and that the terms are fixed when the seller demands payment. Thyssen cites *Certain Welded Pipes and Tubes from Thailand: Final Results of Administrative Review*, 64 FR 56759 (October 21, 1999), *CTL Plate from Japan, Oil Country Tubular Goods from Korea: Final Results of Administrative Review*, 65 FR 13364 (March 13, 2000), *Certain Polyester Staple Fiber from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 65 FR 16880 (March 30, 2000). Thyssen also asserts that officials from Bethlehem Steel, U.S. Steel, National Steel, and Ispat Inland, in hearings before the U.S. International Trade Commission (ITC), stated that sales terms between buyer and seller are not firm based on contracts and can fluctuate or be renegotiated at any time until invoicing. Thyssen noted that TINC and TKSNA's relationships with their customers were similar to the experience of the U.S. mills as customers looked for

price concessions, which Thyssen granted. Therefore, Thyssen asserts that as quantity and price are not fixed until invoice and shipment, invoice date is the appropriate date of sale.

Thyssen rejects petitioners' claim that TINC Distribution and Services (TINC D&S) did not provide evidence that there were changes in the material terms of sale to its principal customers during the POI, and notes that TINC D&S does not sell subject merchandise prior to actual shipment and invoice since (1) it is not obligated to sell German steel to its customers; (2) it often fills orders with domestically sourced steel; and (3) neither TINC D&S nor its customers know the source of the merchandise used to fill an order until invoice and shipping. Thyssen asserts that while a customer's expectations may remain the same regardless of source, the fact that the source of the merchandise is unknown until shipment should be controlling on the Department's date of sale determination. Thyssen also claims that TINC Trading & Services (TINC T&S) provided the Department with substantial documentation establishing that terms of sale were subject to modification with its customers, contrary to petitioners' assertions. Thyssen notes that a customer issued purchase orders that were subject to modifications as to the material, quantity, and price, and that another customer experienced changes in quantities as well, referring to specific changes that took place on the invoice, and other customers may withdraw orders at any time. Thyssen additionally asserts that TKSNA has conclusively established that terms of sale change, noting terms of a contract to one customer, specification changes to another customer's order, and invoices showing that steel was not sold at agreement prices. Thyssen also argues that corporate executives confirmed that customers have broken agreements, that TKSNA has renegotiated contracts, that transfer of ownership occurs on the shipment date, and that TKSNA fills orders from domestic mills as well. Thyssen claims that, as the information reviewed by the Department at verification confirmed that the material terms of sale are not fixed until shipment and invoice, petitioners' allegations should be rejected.

Department's Position: We agree with Thyssen that it properly reported the date of sale for U.S. sales. 19 CFR 351.401(i) states that the Department normally will use as the date of sale the invoice date recorded in the exporter or producer's records kept in the ordinary course of business, unless the record evidence indicates that a different date better reflects the date on which the material terms of sale are established. In determining whether a different date better reflects the date of sale, the Department considers whether there were any changes to the material terms of sale between the date of the underlying contract or order confirmation and issuance of the final commercial invoice. *See, e.g., Notice of Preliminary Determination of Sales at Less than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Venezuela,* 67 FR 31273 (May 9, 2002).

For the *Preliminary Determination*, we accepted the invoice date as the date of sale for U.S. market sales. To determine whether Thyssen properly reported invoice date as the date of sale for both home market and U.S. market sales, on February 15, 2002, we requested that Thyssen explain the frequency and type of changes to the material terms of sale that occur after purchase order dates. In its March 19, 2002, supplemental response, Thyssen stated that there were numerous instances where the price, quantity, and product specifications changed subsequent to the order date.

Based on sales documents reviewed at verification, we found that the magnitude and frequency of changes to the material terms of sale between order date and sales invoice date

were significant for U.S. sales (*see* U.S. Sales Verification Memorandum (U.S. Sales Report), dated July 23, 2002, at 8-11). Specifically, the Department found numerous changes to quantity, dimensions, and price between order date and invoice date for sales by both TINC and TKSNA. *See* U.S. Sales Report at 30, 35-36, and 38.

Moreover, the Preamble to section 351.401 of the Department's regulations states that the Department prefers a uniform date of sale to a different date of sale for each sale in order to simplify reporting and verification of information. In *Allied Tube and Conduit Corp. v. United States*, 127 F. Supp. 2d 207, 218 (CIT 2000), the CIT recognized the necessity for consistency in the Department's procedural applications when determining the appropriate date of sale. Therefore, we conclude that invoice date is when the material terms of sale are set and that the invoice date is the appropriate date of sale.

Comment 7: Use of Facts Available for Sales by the Budd Company

Thyssen argues that the Department's concerns that it did not demonstrate substantial value added by the Budd Company (Budd), an affiliated company in the United States, did not adequately explain its claimed inability to provide the requested information, failed to provide a reasonable alternative methodology for reporting burdensome data, did not include Budd's resales in the sales database, and did not provide information needed to properly analyze the information that was provided, were adequately addressed in Budd's resale database as verified by the Department, and as such CEP for Budd should be calculated based on the data submitted by Thyssen without relying on an adverse inference or facts available.

Thyssen notes that it submitted a complete list of all resales during the POI of the parts Budd produced from purchases from TSKNA on May 13, 2002, that Budd's section C resale database included all resales during the POI and the adjustments calculated were explained in detail in the text of the response. Thyssen also claims that the Department confirmed the accuracy of all of the data it reported for these sales in the section C database, which verified the accuracy of the fields that did not change on the resale, as well as verifying the accuracy of the fields in Budd's resale database that were calculated on a weighted average basis, and the cost verification confirmed the accuracy of the further manufacturing costs as well. Therefore, Thyssen asserts, since it submitted a complete Budd resale database in a sufficiently timely manner for the Department to conduct a verification of the resales, the Department verified many of the selling expenses, the further processing costs and G&A expenses, and since the Department declined to conduct a sales verification at Budd, the Department should calculate the margins for Budd's resales based on the data submitted by Thyssen and Budd, rather than on the basis of facts available used in the *Preliminary Determination*.

Petitioners urge the Department to apply adverse facts available with respect to U.S. sales by Budd, as it did in the *Preliminary Determination*. Petitioners argue that Budd failed to provide information supporting its resale information during verification, and that there is nothing on the record supporting its accuracy. Petitioners therefore conclude that it is unusable for margin calculation purposes.

Specifically, petitioners point out that in its May 13, 2002, section C response, Thyssen indicated that Budd offered quantity discounts, but did not include a field for them in the resale database. Petitioners surmise that all such discounts were included in the field for reporting

further manufacturing expenses (FURMANU). However, petitioners object that Thyssen did not explain the company's policy for granting them, and the basis for eligibility, nor did it provide documentation establishing the program and accuracy of the amounts included under FURMANU. In addition, petitioners object to Thyssen's failure to report separately the warranty expenses Budd incurred on resales to a particular customer, which were also included in the FURMANU variable. Further, petitioners comment that Thyssen did not provide a list of the direct and indirect warranty expenses incurred and a worksheet demonstrating the allocation of direct warranty costs to those parts produced using subject merchandise; did not describe the nature and terms of the warranties provided; did not include copies of warranty agreements; did not include a schedule of all direct and indirect warranty expenses for the three most recently completed fiscal years; and did not calculate a cost per unit for each year. Petitioners also point out that Thyssen included Budd's repacking costs in FURMANU, but also failed to document the derivation of the amount or the actual amount. Similarly, petitioners argue, Thyssen included all ISEs incurred by this affiliate in FURMANU, but failed to document the amount, the items included, and their calculation. Petitioners assert that Thyssen has failed to demonstrate the accuracy of Budd's selling expenses and argue that the fact that U.S. further manufacturing costs and selling expenses incurred by Budd are deducted from U.S. prices in the calculation of CEP does not excuse Thyssen from clearly reporting and supporting each of these costs and expenses. Petitioners conclude that the Department must reject this information as unusable for margin calculation purposes.

Petitioners also comment that there is nothing in the U.S. Sales Verification Report or the Further Manufacturing Cost report indicating that Thyssen made any attempt to demonstrate the accuracy of the gross prices and payment dates it reported for Budd's resales. Petitioners claim that the data are either contradictory to Thyssen's date of sale theory or simply inaccurate. Petitioners note that Budd purchased subject merchandise and used it to manufacture non-subject parts that were sold during the POI. Petitioners argue that Thyssen failed to provide any supporting evidence for the reported resale prices. Further, petitioners point out that Thyssen did not report actual payment dates for these resales, but rather claimed that because the customer pays in a timely manner, it reported payment dates based on the terms of payment, but provided no documentation to demonstrate the accuracy of this method.

Petitioners conclude that Thyssen's obscuring of the actual expense amounts incurred by its affiliate by combining all expenses into a single variable, and then taking no action later to clarify and support the accuracy of its methodology, clearly constitutes a failure to act to the best of its ability to provide the information the Department requested. Petitioners point out that Thyssen's refusal to comply with the Department's instructions earlier in the investigation period prevented the Department from verifying crucial selling expenses, pricing, and payment information. Petitioners argue that the lack of record evidence supporting the accuracy of key resale information, such as selling expenses and gross prices, renders the data unusable for margin calculation purposes. Therefore, petitioners argue, pursuant to section 772(a)(2) of the Act, Thyssen's failure to provide the requested information in a timely manner impeded the Department's investigation and prevented verification, warranting application of facts available. In accordance with section 776(b) of the Act, petitioners urge the Department to make an adverse inference when applying facts available by excluding these resale data from its margin calculations and applying the higher of the highest non-aberrational margin for prime sales in the

U.S. market or the highest rate indicated in the petition, *i.e.*, 26.03 percent, to all of Thyssen's sales to Budd. Alternatively, petitioners propose, if the Department decides to include this affiliate's resale data in its analysis, it should apply adverse facts available to the reported further manufacturing expenses (*i.e.*, FURMANU), gross prices, and payment periods by applying to all resales the lowest gross price and the longest payment period reported for any U.S. sale, and deducting from each resale the largest selling expenses reported for any U.S. sale.

Thyssen asserts that the Department should reject petitioners' suggestion that margins for Budd be based on an adverse inference, as the Department did not complete a sales verification of Budd or expressly discuss Budd's selling expenses. Thyssen claims that substantial information has been provided by Budd, the Department verified Budd's further manufacturing database, the Department verified sales to Budd and declined to verify sales by Budd at Budd's facility, and that the Department is not required to verify all aspects of a respondent's questionnaire. Thyssen argues that Budd resales could have only a minimal impact on the margin calculation, and as Budd provided a complete section C and E database, responded to the Department's questions, and submitted to a complete cost verification, the Department would be acting appropriately and in accordance with law by calculating margins for Budd resales based on the data submitted by Budd. Thyssen cites *U.S. Steel Group v United States*, 22 CIT 104 (CIT 1998) and *Monsanto Co. v United States*, 12 CIT 937, 946 (CIT 1988) in support of its position.

Department's Position: In the *Preliminary Determination*, we applied partial facts available to Thyssen's "further processed" sales made through Budd because Thyssen had not provided the necessary information requested for these sales, nor had Thyssen demonstrated to the Department's satisfaction that it had met the requirements of Section 772(e) of the Tariff Act. We have not applied facts available to these resales for the final determination because Thyssen supplied the Department with a complete database of sales by Budd during the POI on May 13, 2002, as requested. At verification, the Department conducted a complete and thorough verification of the further manufacturing portion of the resales by Budd, as well as sales to Budd.

The Department found no significant discrepancies in Budd's further manufacturing information, and only one correction to G&A expenses (*see* Comment 18 below). At the sales verification, the Department verified two sales from TKSNA to Budd, and found no discrepancies in the information reported (*see* U.S. Verification Report, at 39-40). The Department also reconciled Budd's costs contained in the section E database (*see* Further Manufacturing Cost Verification Report, at 10) and verified that TKSNA accounted for all of its sales to Budd (*see* U.S. Verification Report at 27). There is no information on record that indicates that the data provided on Budd is unreliable. Therefore the Department will accept the sales and further manufacturing information provided by Thyssen for Budd and for the final determination, and will no longer apply facts available for sales by Budd.

Comment 8: U.S. Sales Clerical Errors

Thyssen argues, citing the U.S. sales verification report, that the Department should decrease the SG&A portion of indirect selling expenses (ISEs) for all sales by the U.S. affiliate, TINC, based on a minor clerical error reported to the Department on the first day of verification.

Petitioners urge the Department to incorporate corrections found at verification into its margin calculations. These include the U.S. ISE factor, inland freight from the port to the warehouse and other U.S. expenses reported in the USOTHRU field.

Thyssen agrees that the Department should make a correction to the U.S. ISE factor. Thyssen also agrees that a correction should be made to inland freight from the port to the warehouse and other U.S. expenses reported in the USOTHRU field, although Thyssen notes that the errors were reported as clerical errors by TINC and TKSNA.

Department's Position: We agree in part with petitioners' and Thyssen's requests that the Department should incorporate the minor clerical corrections found at verification for the final determination. However, we disagree with Thyssen's methodology for the calculation of ISEs as described below at Comment 10.

At the Department's request, Thyssen submitted a new database incorporating corrections of the clerical errors reported at verification regarding inland freight from the port to the warehouse and other U.S. expenses. S*ee* Memorandum to the File, dated July 26, 2002. We have incorporated these corrections into our calculation of U.S. price for the final determination.

Comment 9: U.S. Credit and Inventory Carrying Costs

Petitioners argue that Thyssen understated the borrowing rate that it used to determine its reported U.S. credit expense and inventory carrying cost (ICC) amounts because it improperly reduced short-term interest expenses by short-term interest income for TINC and TKSNA. Petitioners point out that the Department instructed Thyssen to use a rate paid on short-term borrowing in U.S. dollars to calculate the reported U.S. credit and ICC amounts, and argue that this rate should not be reduced by short-term income. Petitioners are unaware of a single case in which the Department has made such an adjustment to a company's borrowing rate. Petitioners believe that Thyssen has confused this calculation with the calculation of the cost of production, which uses the net interest expenses of the company.

Thyssen did not comment on this issue.

Department's Position: We agree with petitioners that Thyssen improperly included an adjustment for interest income in its calculation of credit and ICC amounts. Thyssen reduced short-term interest expenses by short-term interest income in determining the short-term interest rate for the POI. Because it is the Department's practice to use an actual short-term borrowing rate to calculate credit and inventory carrying costs, for the *Preliminary Determination* we recalculated U.S. inventory carrying costs by removing Thyssen's short-term interest income offset from Thyssen's calculation of its short-term interest rate and based inventory carrying

costs on the actual short term borrowing rate of TKSNA and TINC during the POI. Therefore, we have not adjusted for interest income in the calculation of credit and ICC.

Comment 10: U.S. Indirect Selling Expenses (ISEs)

Petitioners argue that Thyssen's calculation of the interest expense component of U.S. ISEs based on the interest rate of Thyssen AG, a German company, instead of the interest rate of Thyssen's U.S. affiliates, is inconsistent with section 772(d)(1) of the Act, which provides for reducing CEP by any selling expense incurred in the United States by the producer or affiliated seller in selling the subject merchandise. Petitioners argue there is no legal basis for inclusion of the home market corporate entity's interest expense in the calculation of U.S. ISEs, and that these expenses must be derived from the financial statements of Thyssen's U.S. affiliates, TINC and TKSNA.

Thyssen argues that the Department should reject petitioners' request to recalculate the interest expense component of ISEs based on TINC and TKSNA's financial statements. Thyssen asserts that the Department's longstanding policy, as approved by the Court of International Trade, to calculate financial expense ratios based on financial statements at the highest consolidation level available, is correct. Thyssen cites *Certain Cut-To-Length Carbon Quality Steel Plate Products from France: Final Determination of Sales at Less Than Fair Value*, 64 FR 73143 at comment 14 (December 29, 1999), *Stainless Steel Round Wire from Canada: Final Determination of Sales at Less Than Fair Value*, 64 FR 17324 at comment 15 (April 9, 1999), *Frozen Concentrated Orange Juice from Brazil: Final Results of Administrative Review*, 65 FR 60406 (October 11, 2000)), and as Petitioners claimed in *Certain Carbon Steel Products from Germany: Final Determination of Sales at Less Than Fair Value*, 58 FR 37136, 37152 (July 9, 1993) (*Carbon Steel from Germany*).

Department's Position: We agree with petitioners that the calculation of ISEs incurred in the United States should be based on the financial statements of Thyssen's affiliated companies TINC and TKSNA, and not on that of the parent company (TKAG). According to section 772(d) of the Tariff Act, the Department's policy is to calculate CEP by reducing the price of the sale to an unaffiliated customer in the United States by the amount of any ISEs "associated with economic activities occurring in the United States" (*see* SAA at 823). Additionally, the cases cited by Thyssen are not relevant to Thyssen's argument regarding U.S. ISEs, as these cases deal with either further manufacturing or financial expenses related to calculating the cost of producing the subject merchandise, rather than calculating selling expenses incurred in connection with the sale of subject merchandise in the United States. Rather, in calculating indirect selling expenses, the Department's normal practice is to base these expenses on the expenses of the company that made the sale. *See, e.g., Notice of Final Determination of Sales at Less than Fair Value: Structural Steel Beams from Italy*, 67 FR 35481 (May 20, 2002). For this reason, the Department generally bases indirect selling expenses in CEP situations on the U.S. affiliate that makes the sale, rather than on the expenses at a higher level of consolidation. *Id.*, at 35482.

Thyssen failed to provide the Department with a completed worksheet including TINC's and TKSNA's interest income and interest expense, as requested in the Department's second

Supplemental Section C questionnaire, dated April 26, 2002, and requested again at verification (s*ee* U.S. Verification Exhibit 12). As interest expenses incurred by the parent company are not incurred in connection with indirect selling expenses on sales made in the United States, and as Thyssen has not provided the Department with the requested information, the Department is unable to determine with any certainty whether the sum of imputed U.S. expenses is greater than the net U.S. interest expenses, as Thyssen claimed in their Supplemental Section C response, dated March 19, 2002. Therefore, for the final determination we have not granted Thyssen the offset for net interest expense, and have modified Thyssen's calculation of TINC's and TKSNA's ISE percentage of sales figure (used in the calculation of ISEs) based on the facts available to the Department, using TINC's and TKSNA's fiscal year 2000 financial statements' figures for interest expense and interest income. *See* also Final Analysis Memorandum to the File, dated September 23, 2002.

Comment 11: Setting Negative Margins to Zero in the Calculation of the Dumping Margin

Thyssen asserts that the Department's methodology of calculating separate dumping margins for each CONNUM, and then setting zero margins for those CONNUMs with negative margins when calculating the weighted-average dumping margin, is contrary to law. Thyssen notes that section 771(35)(B) of the Tariff Act requires the Department to consider U.S. sales sold at higher prices than adjusted normal value, and that Article 2.4.2 of the International Antidumping Agreement, as interpreted by the WTO Appellate Body in *European Community Antidumping Duties on Imports of Cotton Bed Linen from India* (*Bed Linen)*, requires that the Department abandon its policy of zeroing negative margins. Therefore, Thyssen argues that in the final determination the Department should not zero out CONNUMs with negative margins.

Petitioners point out that the Department has already rejected Thyssen's zeroing argument in several recent determinations, stating that the Department's methodology is required by U.S. law. Petitioners cite *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 FR 50408 (October 3, 2001) and accompanying Issues and Decision Memorandum at comment 1, *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China*, 67 FR 6482 (February 7, 2002) and accompanying Issues and Decision Memorandum at comment 34, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) and accompanying Issues and Decision Memorandum at comment 12, and *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Luxembourg*, 67 FR 35488 (May 13, 2002) and accompanying Issues and Decision Memorandum at comment 13. Petitioners argue that the statutory language does not provide for calculation of negative dumping margins, noting that the statute defines dumping margin as "the amount by which normal value exceeds the export price or constructed export price of the subject merchandise." Calculation of the weighted average dumping margin, petitioners note, is based on the aggregation of individual margins, each of which may only reflect the amount by which NV exceeds EP or CEP. In sum, petitioners conclude, the Department by statute may not calculate a negative dumping margin, nor may it include a negative margin in its calculation of the weighted

average dumping margin. Similarly, petitioners argue that the Act does not provide for a reduction of potential uncollected dumping duty (PUDD) by negative margins.

Petitioners further argue that the Department has specifically found that the WTO Appellate Body decision in *Bed Linen* has no impact on U.S. law or Department practice. Petitioners cite the Department's statement in the Issues and Decision Memorandum for *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden and the United Kingdom* at comment 38:

> The Bed Linens Panel and Appellate Decisions concerned a dispute between the European Union and India. We have no WTO obligations to act. Therefore, we have continued the practice of using zero where the normal value does not exceed the export price or CEP in our calculations of overall margins for the final results.

Petitioners argue that according to 19 USC § 3512(d), the SAA governs the U.S. interpretation of the Uruguay Round Agreements Act (URAA), noting that the SAA states (at 1032) that neither the Appellate Body nor the WTO have a binding effect under U.S. law, nor provide the legal authority for federal agencies to change their regulations or procedures. Petitioners also point out that the antidumping laws of the United States and the EC differ in important respects, citing as an example that the EC imposes prospective duties, while U.S. law provides only for retrospective duties. Petitioners conclude that a WTO ruling applying to the EC's antidumping law and practice should not be construed to apply to the United States as well.

Department's Position: We disagree with Thyssen and have not changed our calculation of the weighted-average dumping margin for the final determination. First, we note that Thyssen's characterization of the methodology at issue as one that fails to consider U.S. sales sold at higher prices than adjusted normal value in determining the dumping rate is inaccurate. As further discussed below, non-dumped sales are included in the weighted-average margin calculation as just that – sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow non-dumped sales to cancel out dumping found on other sales.

This methodology is required by U.S. law. Section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. At no stage in this process is the amount by which export price or constructed export price exceeds normal value on non-dumped sales permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average rate. It is important to note that the weighted-average margin will reflect any 'non-dumped' merchandise examined during the investigation: the value of such sales is included in the denominator of the dumping rate, while no dumping amount for 'non-dumped' merchandise is included in the numerator. Thus, greater amounts of 'non-dumped' merchandise results in a lower weighted-average margin.

This is, furthermore, a reasonable means of establishing duty deposits in investigations, and assessing duties in reviews. In an investigation such as the present case, the deposit rate calculated must reflect the fact that the Customs Service is not in a position to know which entries of merchandise entered after the imposition of a dumping order are dumped and which are not. By spreading the estimated liability for dumped sales across all investigated sales, the weighted-average dumping margin allows the Customs Service to apply this rate to all merchandise entered after an order goes into effect.

Finally, with respect to respondents' WTO-specific arguments, we note that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations. *See* SAA at 669.

Comment 12: Clerical Errors in the Sales and Cost Verification Reports

Thyssen asserts that the Department has made several errors in its sales and cost verification reports and believe that the errors, which will have no meaningful impact on the outcome, should be corrected. Specifically, Thyssen asserts that the Department should modify its sales and cost verification reports to incorporate the clarifications and clerical corrections Thyssen has alleged.

Petitioners strongly object to Thyssen's attempts to revise the Department's findings at verification, explaining that many of the "clarifications" it provides in Exhibit 7 of its Case Brief change the content and substance of what was written, or modify the Department's report to eliminate discrepancies discovered during verification. Petitioners argue that respondents are not permitted to rewrite the Department's verification reports, or assume that the Department did not know what it was doing. Petitioners argue that any change in the reports at this stage of the investigation places all petitioners at a severe disadvantage, and raises serious due process concerns.

Petitioners argue further that Thyssen attempts to revise the Department's verification findings in its Case Brief, particularly in its cost-related arguments. As examples, petitioners cite Thyssen's assertion that the Department misunderstood the reconciliation portion of the cost verification and its explanation of how the Department can correct its "misunderstanding," and Thyssen's reference to "facts" regarding major inputs allegedly demonstrated at verification, for which petitioners can find no evidence in the verification report. Petitioners also point out that Thyssen appears to introduce new facts with respect to both the G&A and interest expense calculations. Petitioners urge the Department to adhere to its verification findings in its final determination.

Department's Position: We agree with the petitioners that it is not the Department's practice to allow interested parties to revise the Department's verification findings as stated in the Sales and Cost verification reports. Any clerical errors found in the verification reports will be duly noted

and corrected by the Department for the final determination. However, the Department will not modify the language or findings contained in its verification reports based on Thyssen's post-verification allegations of "clerical errors" in the reports. In this regard, we note that most of Thyssen's comments appear to make substantive changes to the Department's findings. Therefore, we have made no changes to the sales and cost verification reports for the final determination.

Comment 13: Slabs Supplied by a Thyssen affiliate

Thyssen argues that the Department should not apply the "major input" rule to the slab supplied by its affiliate. Thyssen argues that because of its business arrangement with the affiliated producer, the transfer of slabs should be treated in the same manner as a transfer between two divisions of a single company. Thyssen cites to *Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review*, 65 FR 48965 (August 10, 2000) (*SSB from India*) where the Department stated "major inputs obtained from a division of the same company are not subject to the major input rule." Also, Thyssen cited *Certain Cold-Rolled and Corrosion-Resistant Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 65 FR 13359 (March 13, 2000) (*CR and CORE Flat Products from Korea*) where the Department explained that it did not apply the major input rule to value the transfer of goods or services between affiliated entities when the entities were collapsed for dumping purposes. Because of the proprietary nature, the details of the business arrangement between Thyssen and its affiliate are discussed in the Calculation Memo dated September 23, 2002.

Thyssen further argues that all slabs produced by its affiliate do not have identical production costs. Therefore, Thyssen argues even if the Department makes a major input adjustment for the slabs received from its affiliate, the calculation should nevertheless be based only on Thyssen's purchases of slabs used to produce cold rolled steel, not slabs used in other areas of production. Finally, Thyssen states that its transfer price reported to the Department accurately reflects its affiliate's COP.

Petitioners argue that the Department should apply the major input rule to the slabs Thyssen purchased from its affiliate. Petitioners cite *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 64 FR 6615 (February 10, 1999) (*Pasta from Italy*) where the Department decided that the legal form of the entities outweighs the operational reality of the close association of the companies when determining if the "transactions-disregarded" and "major-input" rule sections of the Act are applicable. Petitioners state that it is clear from the evidence on the record that Thyssen and its affiliate are not divisions of the same company, but rather are separate legal entities.

Petitioners state even though the Department compared the transfer price to the market price, the Department was not correct in equating the transfer price to the affiliate's COP. Petitioners contend that the transfer prices were set at the beginning of the year, but the price correction was done at the end of the year. Because of this, Thyssen's transfer prices charged throughout the year were not equal to the affiliate's COP. Petitioners contend that because Thyssen did not submit its affiliate's COP, the Department, as a partial facts available

adjustment, should derive a per-unit cost of production from the affiliate's financial statements. Petitioners state that the Department should then adjust Thyssen's cost of slabs purchased from its affiliate according to the major input rule by adjusting to the higher of the transfer price, the market price, or the affiliate's derived cost of production. Petitioners state that the Department should reject as new information Thyssen's claims that the Dortmund Mill processed slabs were provided by the affiliate for hot-rolled products only. Petitioners contend that this information cannot be found anywhere on the record. Furthermore, petitioners claim that the slabs processed into hot-rolled products should not be eliminated in the calculation of the major input rule. Petitioners point out that there is no evidence on the record to suggest that these slabs were significantly different from the slabs purchased from other unaffiliated parties and petitioners state there is no legal requirement that all major input acquisitions used to determine the market price be used to manufacture subject merchandise. Petitioners argue that given the Department's clear practice with respect to this issue, it should continue to apply the major input rule to the slabs supplied by Thyssen's affiliate.

Department's Position: We agree with petitioners that the major input rule applies to the slabs supplied to Thyssen by its affiliate. For the final determination, we have continued to rely on the higher of transfer price, market value, or the affiliate's cost of production to value those transactions in accordance with sections 773(f)(2) and (3) of the Act.

Sections 773(f)(2) and (3) of the Act prescribe how the Department is to treat affiliated party transactions in the calculation of COP and CV. The statute authorizes the Department to disregard certain transactions between affiliated parties if the transaction value does not fairly reflect the market value. With respect to major inputs purchased from affiliated suppliers, the Department's practice is that such inputs will normally be valued at the higher of the affiliated party's transfer price, the market price of the inputs, or the actual costs incurred by the affiliated supplier in producing the input. *See* 19 CFR 351.407(b). The Department has consistently applied this interpretation, see *Pasta from Italy*, except in those situations where it treats respondents who are producers of the subject merchandise as a single entity for purposes of sales reporting and margin calculations (see *CR and CORE Flat Products from Korea*).

In the instant case, both Thyssen and its affiliate are separate legal entities in Germany. We disagree with the respondent that the operational reality of the business arrangement between the two companies outweighs the legal form of the entities when determining whether the "transactions disregarded" and "major input" rule sections of the Act are applicable. In *SSB from India*, the Department determined that the major input rule did not apply to major inputs obtained from a division of the same company. In *CR and CORE from Korea*, the Department stated that among collapsed entities the fair-value and major-input provisions are not controlling. Neither of these situations are applicable in the instant case. It is clear from the evidence on the record that Thyssen and its affiliate are separate legal entities, not divisions of the same company. When determining whether to collapse entities in a proceeding, the Department considers whether both entities produce the merchandise under consideration and whether or not there is a potential for the manipulation of prices or production in an effort to evade antidumping duties. It is evident from the record that Thyssen's affiliate does not produce the merchandise under consideration. Thus, there is not a potential for the manipulation of prices or production in

an effort to evade antidumping duties imposed on the sale of the subject merchandise. Because neither of the conditions are met in this case, the entities do not need to be collapsed.

We disagree with petitioners' statement that the transfer price of the slabs does not equal the affiliate's COP. We determined at verification that the transfer prices used for our comparison from German cost verification exhibit (GCVE) 20 did include the year end price correction between Thyssen and its affiliate. See the Calculation Memo dated September 23, 2002 for an explanation of this adjustment. We calculated the major input adjustment based on the transfer price, market price and COP of all slabs except for those slabs that are not the same as the input slabs used in the production of cold rolled steel. We excluded the slabs used in production of heavy plate and have included the slabs used in production at Thyssen's Bruckhausen, Beeckerwerth, Bochum, and Dortmund mills. The costs from these mills were used in the cost build-ups obtained at verification for the merchandise under consideration.

Comment 14: Unreconciled Cost Difference

Thyssen stated that the Department misunderstood the reconciliation information presented at verification and should not increase Thyssen's reported costs by the unreconciled difference contained in that information. Thyssen explained that the unreconciled difference presented at verification was calculated by comparing the actual cost of manufacturing (COM) to an amount derived from Thyssen's standard cost reporting. Thyssen stated that these costs in the reconciliation were not derived from verified accounting records but rather from reports generated from Thyssen's normal cost accounting system, which only recorded standard partial costs at the product group level. Thyssen contends that because they do not calculate or maintain actual costs on an individual product basis they increased the partial standard costs for actual product shipments by the actual burden rate (*i.e.*, variance) to perform the reconciliation. Thyssen claims that the burden rate does not adjust between partial standard and partial actual costs, thus the unreconciled difference represents the variance between these cost types. Finally, Thyssen argues that the difference between the adjusted full costs of the subject merchandise adjusted by the general variance and the costs reported to the Department is *de minimis* and should not be adjusted.

Petitioners state that the Department should adjust Thyssen's reported costs for the unreconciled difference. Petitioners point out that Thyssen did not identify or document that such amounts do not relate to the merchandise under investigation, as the Department requires. Petitioners cited *Stainless Steel Bar from Italy: Final Determination of Sales at Less Than Fair Value*, 67 FR 3155 (July 22, 2002) and *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil: Final Determination of Sales at Less Than Fair Value*, 64 FR 38756 (July 19, 1999) where the Department stated:

> "Our normal practice is to include {the unreconciled difference between amounts in the accounting records and reported costs} in the calculation of COP and CV unless respondent can identify and document why such amount does not relate to the merchandise under investigation."

Petitioners point out that if Thyssen's costs were not verified and reconciled they should be rejected in their entirety and the Department should apply facts available to Thyssen's reported costs.

Department's Position: We disagree with Thyssen's assertion that the Department misunderstood the reconciliation information presented at verification. At verification, the Department verifiers instructed Thyssen on how to prepare the necessary reconciliations after it was determined that the reconciliation submitted by Thyssen in its January 14, 2002, section D response was inaccurate. The reconciliation Thyssen prepared at verification compared product costs from its normal standard cost reporting system to its actual COM. The reconciliation incorporated an average burden rate to adjust Thyssen's standard product costs to actual "full" costs by product category. Despite Thyssen's attempt to reconcile its reported costs in this manner, there was still an unreconciled difference between the standard costs adjusted by the burden rate and Thyssen's reported total COM.

We agree with petitioners that the unreconciled differences that the Department found between Thyssen's adjusted standard "full" costs and its actual COM and between Thyssen's adjusted "full" standard costs for all cold rolled production and the cost of the merchandise under consideration reported to the Department should be included in the revised reported costs. As articulated in *Stainless Steel Plate in Coils from Taiwan: Final Determination of Sales at Less than Fair Value*, 64 FR 15493, 15498 (March 31, 1999), (*SSPC from Taiwan*) the Department must assess the reasonableness of a respondent's cost allocation methodology according to section 773(f)(1)(A) of the Act. Before this can be done, however, the Department must ensure that the aggregate amount of costs incurred to produce the merchandise under consideration was properly reflected in the reported costs. In order to accomplish this, a reconciliation of the respondent's submitted COP and CV data to the company's audited financial statements, when such statements are available, is performed. Thyssen did not complete this reconciliation as requested because it did not identify and quantify all differences on the reconciliation. As stated in *SSPC from Taiwan*, "in situations where the respondent's total reported costs differ from the amounts reported in its financial statements, the overall cost reconciliation assists the Department in identifying and quantifying those differences in order to determine whether it was reasonable for the respondent to exclude certain costs for purposes of reporting COP and CV." The Department notes that it requested Thyssen to quantify differences between its accounting records and it's reported costs in part III B. of its section D questionnaire and again in step III.D. of the cost verification agenda. Thyssen's attempt at this reconciliation resulted in an unidentified amount, which we have included in the reported costs for the final determination. *See* Cost Verification Report at 15.

Comment 15: Mill Edge Credit in the US Market

Thyssen states that the Department should continue to include certain edge trimming costs in Thyssen's home market COP and allow TINC and TKSNA to deduct the credits received from Thyssen from its further manufacturing material costs. Thyssen claims that the edge trimming credits are similar to revenue received from the sale of scrap and insurance payments, which the Department has allowed in prior cases as adjustments to respondent's costs. Thyssen cites *Stainless Steel Sheet and Strip in Coils from Italy: Final Results Administrative Review*, 67 FR 1715 (January 4, 2002), and *Stainless Steel Sheet and Strip in Coils from Mexico: Preliminary Results Administrative Review*, 67 FR 51204 (August 7, 2002) where the Department has previously allowed these reductions to cost. Thyssen explained that TINC's and TKSNA's actual cost of further processing, as recorded in their books and records and

maintained according to U.S. generally accepted accounting principles (GAAP) have been reduced by the credits received from Thyssen in the same manner as TINC's and TKSNA's costs were reduced by receipt of scrap revenue and insurance payments. Thyssen contends that the edge trimming credits received by TINC and TKSNA from Thyssen relate to economic activity within the US, because Thyssen is paying TINC and TKSNA in the US for edge trimming processing that was performed by TINC and TKSNA in the US. Thyssen argues that the Department would not be constrained if they find that the edge trimming credits relate to activity outside the US. Thyssen contends that the prohibition against adjusting the constructed export price ("CEP") for expenses incurred outside of the US is limited to those direct and indirect selling expenses enumerated in section 772(d)(1) of the Act. Thyssen cited *Stainless Steel Sheet and Strip in Coils from France: Final Determination of Sales at Less Than Fair Value,* 64 FR 30820 (June 8, 1999) (*SSSSC from France*), and *Micron Technology. Inc. v United States,* 243 F. 3d 1301, 1308-1314 (Fed. Cir. 2001). Thyssen points out that no prohibition exists for expenses incurred outside of the US with respect to the reduction of CEP, for the cost of further manufacture or assembly per Section 772(d)(2) of the Act.

Petitioners did not comment on this issue.

Department's Position: We disagree with Thyssen and have added the mill edge credit to the further manufacturing costs reported on the section E database. The analogy Thyssen draws between revenue received from insurance payments and scrap revenue is off point. In the cases cited, the Department allowed an offset to the respondents' further manufacturing costs for actual revenues received as a result of an economic activity or economic events related to processing costs that occurred in the United States. In the instant case, the edge trimming credit represents an adjustment to the inter-company sales prices for materials negotiated between Thyssen and TINC and TKSNA. See respondent's August 13, 2002, case briefs point number 5 on page 2. While section 772(d)(2) of the Act allows for the price used to establish the CEP to be reduced by the cost of any further manufacture or assembly, this provision does not refer to adjustments to the inter-company transfer prices for materials between affiliates. We also disagree with Thyssen's claim that the credits relate to economic activity in the United States. The mill edge credit in no way relates to any production activity in the U.S. Thyssen granted the credit because the product shipped from Germany was not edge trimmed (*i.e.*, it was mill edge), however, TINC and TKSNA were still charged by Thyssen for an edge trimmed product. The products shipped from Germany were actually edge trimmed in the United States by TINC and TKSNA. Because this economic activity took place in the United States, the full cost should be included in TINC's and TKSNA's section E database.

Finally, we disagree with Thyssen's statement that the Department should accept the edge trimming credit as reported because the credit is recorded in TINC's and TKSNA's normal books and records as a reduction to the further processing costs. SAA at 164 states that "Commerce normally will calculate costs on the basis of records kept by the exported or producer of the merchandise, provided such records are kept in accordance with GAAP of the exporting or producing country and reasonably reflect the costs associated with the production and sale of the merchandise." As stated above, we do not believe that an adjustment to the inter-company transfer price reasonably reflects TINC's and TKSNA's cost to edge trim the

merchandise. Therefore, we have added the mill edge credit to the further manufacturing costs reported on the section E database.

Comment 16: General and Administrative Expense Ratio

Thyssen argues that the Department should not adjust the reported costs for administration services from its parent company, the gain and loss on sale of fixed assets, research and development (R&D) costs, expenses and reimbursements related to the power plant damage, provisions for affiliates, shareholders contribution, or depreciation expenses for railway tracks because these expenses were either already included in the G&A expenses, already included elsewhere in the submitted costs or should be offset by related income amounts.

Thyssen points out that it provided the Department with a comprehensive schedule identifying the gains and losses from the sales of fixed assets. Thyssen contends that this schedule shows that the gains and losses constitute one time sales of plants and machinery which were significant enough to be treated separately from the respondent's other business activities, as was the case in *Cut-to -Length Plate from Korea: Final Determination of Sales at Less Than Fair Value*, 64 FR 73196 (December 29, 1999) (*CTL Plate Korea*).

Thyssen claims that the depreciation expense on the railroad tracks is already included in the reported cost, and to adjust the transfer price would result in double counting that expense. Thyssen states that it depreciates the railroad tracks and charges its affiliate, Eisenbahn and Hafen GmbH, (E&H) for the depreciation and that E&H includes the depreciation in the transport services it bills to Thyssen. Thyssen argues that because it included all of these expenses, without any offset for depreciation income when it computed the cost of transportation any additional charge for the railroad track depreciation would result in double counting the expense. Furthermore, Thyssen contends that it did provide information on prices E&H charges to unaffiliated customers, which can be used to compare to the transfer prices. Thyssen asserts that if the Department were to adjust for depreciation on the railroad tracks, the adjustment should be made to freight cost rather than the cost of materials.

Thyssen claims that the energy and power facility supplied companies that were at one time affiliated with Thyssen, but were either sold or shut down in 1998 and 1999. Thyssen points out that these former affiliates were not involved in the production of subject merchandise and this depreciation should not be included in the reported costs.

Petitioners cite *CTL Plate Korea*, where the Department states that in deciding whether or not to include gains or losses on sales of fixed assets, the Department generally "considers the nature of the activity and whether the activity is significant enough to be treated separately from the respondent's other business activities." In that decision, the Department emphasized that "it is not relevant whether or not the particular asset was used to produce subject merchandise." Petitioners argue that in the instant case Thyssen failed to identify the specific nature of the fixed asset generating the gain and, therefore, contend that the Department should assume that the asset is non-depreciable. Petitioners again refer to *CTL Plate Korea* where the Department said that "the gain on sale of land should not be included in respondent's reported costs." Petitioners infer that because there is no evidence to the contrary, any gain on the sale of fixed assets should be deemed as related to a sale of land, and should be excluded from the reported costs.

Furthermore, petitioners cite *SSSSC from France* as support for excluding gains or losses on the sale of financial assets.

Petitioners state that Thyssen failed to include depreciation of its railroad tracks in its calculation of COP and CV. Petitioners point out that the railroad tracks are owned by Thyssen and operated by its affiliate E&H. E&H charges Thyssen for freight, however, Thyssen issued credit memos against E&H's freight invoices to charge E&H for the depreciation on the railroad tracks. Petitioners contend that according to section 773(f)(2) of the Act, the Department may disregard transfer prices between affiliated persons if they fall below market value. Petitioners claim that Thyssen failed to provide any information as to the market value or cost of E&H's services. Petitioners point out that when the information on the record does not allow for any reasonable determination of market value, the Department must ensure that the transfer price is fully included in the reported costs. Petitioners state that the transfer price for the services provided by E&H is below market price because of the credit memos issued for the depreciation on the railroad tracks. Petitioners propose that the Department adjust Thyssen's reported cost by adding railroad depreciation to the transfer price of the freight provided by E&H.

Petitioners claim that the depreciation of Thyssen's energy and power facility should be included in the reported costs. Petitioners state that the energy and power facilities benefitted the overall production activities of Thyssen and should be counted in the cost of manufacturing.

Department's Position: We agree with both Thyssen and petitioners in part. As noted in the GCVR dated July 22, 2002 in the form of a Memorandum to Neal M. Halper from Michael P. Harrison, the Department noted that an administrative charge from Thyssen's parent company, TKAG, was included in the G&A costs reported to the Department and the R&D costs were included in the selling expenses reported to the Department. As Thyssen pointed out, it would be inappropriate to make an adjustment and double count these expenses. Also, we found at verification that the provisions for affiliates and shareholders' contributions were investment expenses and were appropriately excluded from the G&A expense rate calculation.

With regard to gains and losses on sales of fixed assets, Thyssen failed to provide any information to suggest that its gains and loses on fixed assets should be excluded from the reported costs. In *CTL Plate Korea,* the case cited by Thyssen, the Department excluded a gain from non-depreciable assets, which were of such significance that they exceeded the entire amount of the respondent's G&A expenses. Furthermore, in *CTL Plate Korea*, the Department stated that the routine dispositions of fixed assets in the normal part of a company's operations will be included in the reported costs. We also disagree with Thyssen that the net loss from the sale of fixed assets should be offset by the gain on the sale of financial assets. As noted in *SSSSC from France*, "items relating to investing activities should not be included in the calculation of COP and CV." As Thyssen explained at verification, the gain on the sale of financial assets was generated from the sale of Thyssen's investment in a related company, and therefore should not be included in the calculation of the G&A expense rate.

We disagree with Thyssen that the depreciation expense on the railroad tracks owned by Thyssen and used by E&H was included in the reported costs. The record shows that Thyssen recorded depreciation expense on the railroad tracks. It also shows E&H charges Thyssen for freight when E&H uses Thyssen's railroad tracks to move Thyssen's goods. Thyssen does not charge E&H when E&H uses Thyssen's tracks, however, Thyssen reduces the amount it pays

E&H for freight because E&H uses its tracks. The Department verified that the net amount of freight was reported as inland freight. Because the net freight expense was used to calculate inland freight, we are not double counting the depreciation cost when we increase Thyssen's reported costs by the depreciation on the railroad tracks. Because inland freight is being added to Thyssen's COM, as discussed in comment 3 above, we included the depreciation on the railroad tracks in the calculation of the G&A expense ratio.

Regarding the depreciation expense on the energy and power facility, which has been taken out of service but was still being depreciated, we agree with petitioners and have included this amount in the calculation of the G&A expense ratio. We disagree with Thyssen's assertion that because these facilities were not involved in the production of subject merchandise they should be excluded from the G&A expense rate calculation. In *CTL Plate Korea*, the Department states that "{W}e also disagree that the asset's relationship to production is the standard for whether to include the gain in G&A expense. G&A expenses are those expenses, which relate to the general operations of the company as a whole, rather than to the production process. Therefore, it is not relevant whether or not the particular asset was used to produce the subject merchandise." In *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review*, 62 FR 1954, 1958 (January 14, 1997) (*Silicon Metal*) the Department states that it includes in the reported costs the depreciation of equipment not in use or idled. In *Silicon Metal*, the Department points out that depreciation expenses reflect not only wear and tear from usage but also aging and obsolescence, which affect idle assets as much as, and sometimes more than, active assets. As a result we have included the depreciation of the energy facility in the G&A expense rate calculation.

Comment 17: Financial Expense Ratio

Thyssen argues that the Department improperly calculated the denominator of the financial expense ratio by estimating TKAG's consolidated packing expenses based on a ratio of Thyssen's packing costs to Thyssen's cost of sales. Thyssen claims that such methodology overstates the total packing expenses (thereby decreasing the denominator used to calculate financial expenses) because TKAG only incurred packing costs in its steel business and not in its other divisions.

Petitioners state that Thyssen failed to provide support at verification for the short-term interest income and should be denied this offset to total interest expenses used in the numerator of the calculation. Petitioners claim that it would be inappropriate for the Department to merely replace the respondent's income offset with its own estimation. Petitioners cite *Silicon Metal from Brazil: Administrative Review*, 64 FR 6305 (February 9, 1999) and *SSSSC from France* where the Department disallowed the claimed offset to financial expenses because the respondent had not substantiated it. Petitioners argue that the Department should continue to estimate the packing costs included in TKAG's cost of goods sold. Petitioners contend that Thyssen's assertion that TKAG only incurs packing costs in its steel branches does not appear in the record, which constitutes new information and should be rejected by the Department.

Department's Position: We agree with petitioners and have disallowed Thyssen's deduction for short-term interest income and we have continued to calculate the packing costs deducted from TKAG's cost of goods sold as shown in our verification report.

With regard to the short-term interest income offset, at verification Thyssen provided a schedule identifying the general ledger accounts included in the short-term interest income offset, but they did not provide any substantiation that the amounts were short-term in nature. As noted in *SSSSC from France*, the Department excluded the respondent's short-term interest offset because neither of the respondent's audited financial statements reported any breakdown of long- vs. short-term income, nor was the respondent able to provide support for its claimed short-term interest income. Therefore, based on the Department's past practice, we have disallowed Thyssen's short-term interest income offset in the financial expense rate calculation.

With regard to packing costs deducted from the cost of goods sold, we estimated the consolidated packing costs included in TKAG's consolidated cost of goods sold based on the best information available on the record. See page 20 of the public version of the memorandum dated November 6, 2001 from Michael P. Harrison to Neal M. Halper for the cost verification report on Stainless Steel Bar from France.

Comment 18: G&A Further Manufacturer

Thyssen states that in the preliminary determination the Department erred in its calculation of G&A expense for further manufacturers TINC, TKSNA and Budd. First, Thyssen argues that the Department double counted some of TINC's and TKSNA's selling, general and administrative expenses as both G&A expenses and indirect selling expenses. Thyssen points out that in the submitted section C and section E databases, TINC and TKSNA both divided selling, general and administration expenses for the POI between indirect selling expenses and G&A expenses and then calculated their G&A rate on a per-ton basis. Thyssen agrees with the Department that TINC's and TKSNA's G&A expenses need to be recalculated to conform with the Department's methodology to base the G&A rate on a percentage of manufacturing costs. Furthermore, Thyssen agrees that the Department should use the fiscal year ending 2001 financial statements to calculate this percentage. Thyssen argues that in the U.S. cost verification report, the Department overstated Budd's G&A rate because it did not increase Budd's cost of sales by its verified variances. Thyssen also argues that the Department overstated TINC's G&A rate calculated in the U.S. cost verification report.

Petitioners agree with the methodology used by the Department in the verification report and state that Department should adjust TINC's and TKSNA's G&A rate calculation consistent with that approach.

Department's Position: We agree with both Thyssen and petitioners that TINC's, TKSNA's and Budd's G&A expense rates should be recalculated in order to compute the G&A rate as a percentage of labor and overhead from the fiscal year ending 2001 financial statements for each company. However, we only agree with Thyssen in part in regards to the G&A expenses included in the numerator of the calculation. We agree that the Department's calculation of the G&A expense ratio for TINC, TKSNA, and Budd for the preliminary determination resulted in the double counting of certain expenses. We do not, however, agree with Thyssen's G&A

expense rate calculations proposed in their case briefs. Due to the proprietary nature of the calculations this is discussed in the Final Calculation Memorandum from Michael P. Harrison to Neal M. Halper dated September 23, 2002.

Comment 19: Depreciation of Machine Tools and Spare Parts

Petitioners argue that Thyssen has reported the cost of machine tools and spare parts consumed rather than the cost of machine tools and spare parts purchased. Petitioners point out that it is the Department's normal cost accounting methodology to require respondents to report the costs of inputs purchased even if those inputs were not consumed. Furthermore, petitioners claim that the amount of depreciation excluded indicates that the burden rates used to charge these costs to the cost centers were significantly understated and the additional depreciation amounts should be included in the Department's final cost calculations.

Thyssen claims that the additional depreciation of machine tools and spare parts questioned by the petitioners has already been included in the reported cost. Thyssen states that this additional cost has been allocated to subject merchandise on a product-specific basis and the Department should not increase COM for this additional amount.

Department's Position: We agree with Thyssen and have not increased the reported COM for the additional depreciation on machine tools and spare parts. We confirmed at verification that the additional depreciation was included in the costs reported to the Department. *See* the German Cost Verification Exhibit 5.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margins for all firms in the *Federal Register*.

AGREE____ DISAGREE____

_____

Faryar Shirzad
Assistant Secretary
for Import Administration

_____

Date